IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,

v.

CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S.

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OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri are not officially reported

but are set forth at pages A-6 to A-8 of the Petition for Writ of Certiorari filed in No. 76-1837 by Petitioners Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S. (hereinafter referred to as the "Punta Gorda Isles petitioners"). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 550 F.2d 1106 and reproduced at pages A-9 to A-21 of that Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1977. Petitioners' timely petition for rehearing was denied on March 28, 1977. Separate Petitions for Writs of Certiorari were filed on June 23, 1977, by the Punta Gorda Isles petitioners (No. 76-1837) and by the other defendant, Coopers & Lybrand (No. 76-1836), and were granted on November 14, 1977, at which time the cases were consolidated for briefing and argument. 46 U.S.L.W. 3332.[1]

The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Sections 1291 and 1292 of Title 28, U.S.C., and Rule 23 Fed. R. Civ. P., all of which are set forth in their entirety in the Addendum to this brief, *post*.

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[1] On December 5, 1977, the Court granted certiorari in No. 77-560, *Gardner v. Westinghouse Broadcasting Company* and set that case for oral argument in tandem with the instant matter. 46 U.S.L.W. 3373.

QUESTION PRESENTED

Did the Court of Appeals err in deciding that the order of the District Court determining that this action could not be maintained as a class action was a "final decision" that could be appealed under 28 U.S.C. § 1291?

STATEMENT OF THE CASE

The complaint in this action was filed in the United States District Court for the Eastern District of Missouri on July 27, 1973 (A1). The complaint asserts claims based on alleged violations of Sections 11, 12(2), and 17 of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5. The claim asserted on behalf of the named plaintiffs is for approximately $2,650 plus interest; the complaint also asserts claims on behalf of the class described therein for an unspecified amount. The jurisdiction of the District Court is based on Section 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934 (A23-35).

On December 30, 1974, at the hearing on the plaintiffs' motion for an order that the action could proceed as a class action, the plaintiffs offered evidence that the class included, *inter alia*, one member with a claim of approximately $500,000 and another with a claim of approximately $140,000, both of whom expressed a willingness to help pay the expenses of the litigation. (A151-153).

On June 19, 1975, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the District Court entered its order determining that the action could proceed as a class action (A11).

On September 1, 1976, again pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the District Court entered

its order determining that the action could no longer be maintained as a class action by the named plaintiffs (A207).

The plaintiffs did not seek to appeal that order as an interlocutory order pursuant to 28 U.S.C. § 1292(b). Rather, they based their appeal to the United States Court of Appeals for the Eighth Circuit on 28 U.S.C. § 1291, which applies only to "final decisions" (A208). The defendants filed a timely motion to dismiss the appeal for lack of jurisdiction, asserting that the order of the District Court was not a final decision (A210).

The United States Court of Appeals for the Eighth Circuit found as a matter of fact that the individual claim of the plaintiffs was so small that they would not continue to prosecute the case unless the District Court's order was reversed. On the basis of this finding, it concluded that the order was a "final decision" and that it therefore had jurisdiction to hear the appeal (550 F.2d 1106, 1110).

On the merits of the case, the Court of Appeals held that the District Court had abused its discretion in determining that the action could not be maintained as a class action, and it reversed the District Court's order (550 F.2d 1106, 1110-1113).

The defendants' motion for rehearing or rehearing *en banc* was denied on March 28, 1977 (A19).

Separate petitions for certiorari were filed on June 23, 1977, by Coopers & Lybrand (No. 76-1836) and the other defendants (No. 76-1837). On November 14, 1977, the petitions were granted and the cases consolidated.

SUMMARY OF ARGUMENT

In this case the District Court ordered that the action could no longer be maintained as a class action by the named plaintiffs. The Court of Appeals held that order was a "final decision" that could be appealed under 28 U.S.C. § 1291. In so doing it adopted the "death knell" doctrine; *i.e.*, it ruled that an order that an action cannot be maintained as a class action is "final" within the meaning of 28 U.S.C. § 1291 if the Court of Appeals determines that the plaintiff will not continue to prosecute the action unless the order is reversed.

The arguments as to why this Court should reject the death knell doctrine are fully developed in the brief filed by the other petitioner in this consolidated case, Coopers & Lybrand. These petitioners endorse and adopt those arguments, and they will not be repeated at length in this brief. This brief supplements those arguments by arguing that: (1) Even if the Court does not reject the death knell doctrine, it should nevertheless reverse the judgment of the Court of Appeals in this case because that court failed (a) to require a hearing on the issue of finality, and (b) to consider all of the factors relevant to a determination of finality; and (2) The death knell doctrine should be rejected as unworkable and unnecessary, because if it were properly applied it would add yet another layer of procedural complexity to the already cumbersome class action device, and because 28 U.S.C. § 1292(b) provides a more effective procedure for appellate review of class action decisions.

Under the death knell doctrine, the finality of a class action order is regarded as a question of fact. A necessary concomitant of the doctrine, therefore, is a procedure by which the question of finality can be answered. Fairness and judicial efficiency require that procedure to include a hearing by the district court at which the parties could offer evidence on the factual questions.

In this case the parties were given no opportunity to discover or to offer evidence on the issue of finality. The Court of Appeals made its factual determination of finality on the basis of a record directed to other issues, a record that does not contain all of the evidence relevant to the finality issue. Therefore, even if the Court does not reject the death knell doctrine, it should rule that the Court of Appeals erred by not requiring a hearing on the finality issue.

The death knell doctrine requires the Court of Appeals to predict the future conduct of the plaintiff. In this case the Court of Appeals unduly restricted its inquiry into finality and it failed to consider several factors relevant to the finality issue. If the Court does not reject the death knell doctrine, it should nevertheless rule that the Court of Appeals erred in this case by not considering all of the factors that are involved in any realistic attempt at a prediction by the court of whether the action will continue to be maintained.

If the death knell doctrine were to be adopted, fairness and judicial efficiency would dictate that a hearing on the issue of finality be held by the district court prior to an appeal to the Court of Appeals. The addition of this procedural complexity to the already cumbersome class action devise is unnecessary (and unwarranted by statute), because in those cases in which an appeal is justified, it can be more efficiently accomplished under 28 U.S.C. § 1292(b). The Court, therefore, should reject the death knell doctrine.

ARGUMENT

The other petitioner in this consolidated case, Coopers & Lybrand, has filed a comprehensive brief in which the arguments why the death knell doctrine should be rejected are fully developed. This brief does not attempt to duplicate those arguments or to review the authorities there discussed. Rather, these petitioners adopt those arguments and seek in this brief only to supplement them.

I

Even if the Court Does Not Reject the Death Knell Doctrine, It Should Rule That the Court of Appeals Erred in Determining That the Order of the District Court Was a "Final Decision" Because: (A) The Parties Were Not Afforded an Opportunity to Offer Evidence on That Issue; and (B) The Court of Appeals Did Not Consider All Factors Relevant to Finality.

A. **The parties were not afforded an opportunity to offer evidence on the issue of finality.**

An order determining that an action cannot proceed as a class action is made "conditional" by the express provision of Rule 23. In terms of its legal effect it cannot be a "final decision." Those Courts of Appeals that have adopted the "death knell" doctrine, however, attempt to measure the finality of such an order by its practical effect rather than by its legal effect. In so doing, they convert the issue of finality from a question of law to a question of fact.

If under the death knell doctrine finality (and therefore appealability) is a question of fact, a necessary concomitant of the doctrine is a fair and efficient procedure by which that question can be resolved. With respect to questions of fact, procedural

fairness usually requires an opportunity to offer evidence and to attempt to discover evidence.

The procedure used by the Court of Appeals in this case provided neither. None of the issues presented to the District Court required evidence on the finality issue, and the parties never had an appropriate opportunity to discover or to offer evidence on that issue. While there may be some evidence in the record that is relevant to the finality issue, the presence of that evidence in the record is purely fortuitous: it was offered for other purposes. There is no reason to believe that the record contains all of the evidence relevant to the finality issue that the parties would have offered if they had been given an appropriate opportunity. Nor was there any discovery directed to the finality issue.

For example, in determining the finality issue in this case the Court of Appeals considered only "the amount of the plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit." (550 F.2d 1106, 1109). However, if other members of the class were willing to assist in financing the litigation, that fact would be relevant to the decision on the issue of finality.[2] *Hooley v. Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977); *Share v. Air Properties G. Inc.*, 538 F.2d 279 (9th Cir.), *cert. denied sub nom. Woodruff v. Air Properties G. Inc.*, 429 U.S. 923 (1976). The

[2] The record in this case contains a strong indication that other members of the proposed class were in fact willing to assist in financing the litigation; plaintiffs' former counsel so testified (A151-153). Nor was there any evidence that those members of the class ever changed their minds. Nevertheless, the Court of Appeals concluded that "the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel" (550 F.2d 1106, 1109 n. 2).

The court's conclusion was, perhaps, based on a statement in a brief of the plaintiffs-appellants:

> "Present counsel have represented the Livesays since June 30, 1975 and have not been retained to represent any other persons described by plaintiffs' former counsel. Plaintiffs' present counsel know of no class member who has stated a willingness to intervene in this action."

(Reply Brief for Appellants-Petitioners, pp. 5-6 in the Court of Appeals).

This statement is unsworn and was not subject to cross-examination. Moreover, it does not negate a continued willingness to assist in financing the litigation by those persons identified by plaintiffs' former counsel.

procedure (or, perhaps more precisely, the lack of procedure) approved by the Court of Appeals in this case did not permit the full development of the evidence concerning the continued willingness of other members of the class to finance the litigation. The defendants never had the opportunity to discover and to offer evidence on that issue.

The Court of Appeals did not have the benefit of a record directed to the issue of finality. Instead, it relied on bits and pieces of evidence scattered through the record, evidence that had been offered on other issues. (550 F.2d 1106, 1110 n.5).

The death knell doctrine, as applied by the Court of Appeals in this case, is not only procedurally unfair, but it also involves an inefficient use of judicial manpower and an improper allocation of judicial functions. The doctrine requires an appellate court to make the initial finding of fact on the issue of finality. Finality, considered as a question of fact, is a complex issue; it is, in essence, a prediction of whether the plaintiff will continue the litigation if the district court's order is not reversed. Any realistic approach to this prediction would require consideration of many factors. As more fully developed below, the list of relevant factors might include: the plaintiff's estimate of the probability of success on the merits; the possibility of assistance by other members of the class; the willingness of plaintiff's counsel to advance the costs and expenses of litigation; and the amount of trial preparation and discovery that had been accomplished before the decision on the class action issues. In

this case, and in most cases, the record developed without a hearing on the question of finality simply does not contain sufficient evidence concerning these factors for an appellate court to make a realistic and intelligent prediction of finality. An appellate court should not speculate about these factors in determining whether or not it has jurisdiction to hear an appeal from a district court order denying class action status.

Moreover, for the Court of Appeals to make an initial factual decision distorts the judicial process by depriving the parties of the right to effective appellate review of that decision. A decision on factual issues made initially by the district court is subject to review by the Court of Appeals. When the Court of Appeals is the initial fact-finder, the right of effective appellate review is denied. It is not the function of The Supreme Court of the United States to afford the only forum for review of initial findings of fact by the Courts of Appeals.

The importance of a procedure that provides appropriate appellate review on the finality issue is illustrated by the fact that the record in this case contains compelling evidence that other members of the proposed class were in fact willing to assist in financing the litigation; despite this evidence the Court of Appeals erroneously found that plaintiffs' change of counsel terminated the role of those other class members.[3]

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[3] See note 2, *supra*. These petitioners submit that the Court of Appeals also made other erroneous factual determinations. For example, in determining that the respondents (plaintiffs below) were not dilatory in seeking to discover the names and addresses of the class members, Judge Stephenson stated:

> "The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information. This period runs from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.
>
> "We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, *counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.* In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do." 550 F.2d 1106, 1111-1112 (Italics added).

The letter to which Judge Stephenson refers is reproduced in the Appendix at page 215. *That letter did not refuse to produce the requested information.* It did no more than notify the plaintiffs of

In short, the procedures of the Courts of Appeals are ill-adapted to make the initial finding on the finality issue correctly and efficiently. To have the Court of Appeals make the initial finding on finality deprives the parties of effective appellate review of the issue.

A better allocation of judicial functions than that employed by the Eighth Circuit—and a more efficient use of judicial manpower—was suggested by the Court of Appeals for the Fifth Circuit in *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971). There, the court suggested that the trial court should hold a hearing and make the initial finding on the issue of finality, so that the Court of Appeals would have a fully developed record on that issue. In this case the Court of Appeals expressly declined to follow the procedure suggested by *Gosa* (550 F.2d 1106, 1110, n. 5). By refusing to follow that pro-

cedure, the Court of Appeals in this case not only unfairly deprived the parties of the opportunity to offer evidence on the finality issue, it also deprived itself of the benefit of having that issue fully developed through the adversary process and of having the initial factual determination made by the District Court.

If orders determining that actions cannot proceed as class actions are to be appealable as "final decisions" under 28 U.S.C. §1291, then in all cases the parties should be given an opportunity after such an order to discover and to offer evidence on the question of whether or not that order is indeed final. By failing to require such a hearing in this case, the Court of Appeals erred. Therefore, even if this Court does not reject the death knell doctrine, it should reverse the decision of the Court of Appeals in this case.

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the defendant's position that the information requested by the plaintiffs was not a list of the class members who were entitled to receive notice. The defendant remained willing to produce the information, but it did not agree that notice to the initial registered owners constituted notice to the class.

This point is made abundantly clear in the memorandum filed by the defendant Punta Gorda Isles, Inc. in opposition to the Plaintiffs' Second Request for Production of Documents; the following statement appears on page 6 of that memorandum:

> "In the event that . . . the plaintiff wishes to have the names and addresses of the initial registered holders, rather than having only the names and addresses of the brokers, *Punta Gorda is certainly willing to request the transfer agents to prepare lists of the initial registered holders and to furnish such lists to the plaintiffs* if the plaintiffs pay the expense of compiling such lists. The plaintiff obviously needs a list of the brokers who were the first record holders . . . in determining the purchasers at the offering, and *the defendant has never objected to furnishing names of such brokers or first registered holders to the plaintiff* at the plaintiffs' expense. What the defendant has objected to is (1) furnishing a list of registered holders *after* the first registered holders, and (2) the giving of the notice only to the first registered holders rather than to the members of the class and (3) giving the notice to persons who are not members of the class and (4) bearing the expense in connection with the plaintiffs' notice." (Emphasis added).

In short, the defendant Punta Gorda never refused to furnish the information requested by the plaintiff, and Judge Stephenson's statement to the contrary is erroneous. The defendant did no more than to advise the plaintiffs that they were seeking the wrong information.

Another fact was known to the District Court but apparently overlooked by the Court of Appeals. After receiving the letter dated April 21, 1976, the plaintiffs were totally inactive for another three months. The plaintiffs' request for production of documents was not filed until July 20, 1976. And even then the plaintiffs failed to address the problem of identifying the "street name" holders. In the context of a case already marred by long delays this additional three months delay by itself would support the district court's decision to decertify.

[4] There can also be a question whether another class member will assert the claims of the class where, as occurred in this case, the requisite class has been found but the named plaintiffs are held not to be adequate class representatives. *See Hooley v. Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977).

B. The Court of Appeals did not consider all factors relevant to finality.

In this case the Court of Appeals considered only the size of the claim of the named plaintiffs, their financial resources and the probable cost and complexity of the lawsuit. (550 F. 2d 1106, 1109). The approach of the Court of Appeals is overly simplified, perhaps simplistic. A realistic analysis of whether or not a class action decision is final as a practical matter involves many more facts.

The "death knell" doctrine requires the Court of Appeals to predict whether the plaintiff will continue the litigation if the district court's order on the class action issues is not reversed; finality is measured by the predicted effect of the order on the plaintiff's volition.[4] In deciding whether a particular determination of the class action issues adverse to the plaintiff is a "final decision," the appellate courts have focused primarily on a single factor: the amount of the plaintiff's claim. Compare *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) with *Milberg v. Western Pacific Railroad Co.*, also 443 F.2d 1301 (2d Cir. 1971). But in many cases this factor has only marginal relevance; in reality the two critical issues are:

1. Is the plaintiff's counsel willing to continue to prosecute the case after an adverse decision on the class action issue by the district court?

2. Is there a source of financing for the costs and expenses of continued litigation after such a decision?

If these two questions can be answered in the affirmative, the district court's decision cannot be regarded as the "death knell" of the action, and an appeal should not be permitted under 28 U.S.C. §1291.

In most cases, the willingness of plaintiff's counsel to continue after an adverse ruling on the class action issues will be determined by four factors:

1. The estimate by plaintiff's counsel of the probability of success on the merits; and

2. The estimate by plaintiff's counsel of the probability of successfully appealing the class action decision if the plaintiff succeeds on the merits; *see United Airlines, Inc. v. McDonald*, — U.S. —, 53 L. Ed. 2d 423, 431 at n. 14 (1977); and

3. The size of the fee anticipated by plaintiff's counsel if he is ultimately successful both on the merits and on the class action issues; and

4. The estimate by plaintiff's counsel of what additional work he would have to do to try the merits of the individual plaintiff's claim and then to appeal the class action decision.

If the plaintiff's counsel believes that there is a significant probability of success on the merits, and if he also believes there is a significant probability of successfully appealing the adverse class action decision if he does succeed on the merits, then it is highly probable that he will continue the litigation after an

adverse decision on the class action issues—even if the size of the named plaintiff's claim is minimal.[5]

The possibility of an adverse decision on the class action issues by the district court has to be considered by the plaintiff's counsel right from the beginning. In a real sense, then, an interlocutory order by the district court adverse to the plaintiffs on the class action issues does no more than increase the anxiety level of plaintiff's counsel. If he believes that he can convince the Court of Appeals to reverse that decision on appeal, he will continue to prosecute the action—whether that appeal occurs immediately and before the decision of the district court on the merits, or whether he is forced to wait until after a decision on the merits to appeal the class action decision.

Another factor relevant to a decision on finality is the availability of a source of financing for the costs and expenses of the

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[5] Consider, for example, a hypothetical plaintiff's counsel who undertakes representation of a class where he feels the matter at the outset is worth pursuing based on his evaluation of a potential recovery on the merits that would result in a $600,000 fee. If at the beginning he feels there is a 90% chance of success on the class action issue, he would discount the value of the potential recovery and fee by 10%, but would still pursue the matter in anticipation of a fee "valued" at $540,000.

Suppose that thereafter the district court makes a determination that the action should not proceed as a class action, and that the plaintiff's counsel believes the decision by the district court is erroneous. If an immediate appeal of the class action decision is not available, the plaintiff's counsel must then estimate the probability of success on a later appeal on the class action issue. If he estimates the probability of success on that appeal as 50%, then the adverse ruling on the class action question by the district court reduces the value of his expectation from $540,000 to $300,000 (.50 x $600,000). The question of "finality" then becomes: Will plaintiff's counsel continue to prosecute the action on the basis of an expectation having a present value of $300,000? In making this decision the plaintiff's counsel must consider how much trial preparation and discovery he has already accomplished, and he must estimate the additional work required to try the merits of the plaintiff's claim and to appeal the class action decision. It is this additional effort that he must weigh against his reduced expectation in deciding whether or not to continue.

litigation (other than counsel fees). At the commencement of a proposed class action, there are at least three potential sources of financing:

(a) the named plaintiff;

(b) plaintiff's counsel; and

(c) unnamed members of the proposed class.

A realistic assessment of the finality of a decision by the district court adverse to the plaintiff on the class action issues must examine its impact on these sources of financing.

In the accepted model of a lawsuit, the plaintiff agrees to be responsible for the payment of the costs and expenses of prosecuting his claim. While it may be permissible for counsel to advance or guarantee the payment of such costs and expenses, the client should remain "ultimately liable." *See ABA Code of Professional Responsibility*, E-C 5-8, DR-5-103(B). When the named plaintiff in a proposed class action agrees to be "ultimately liable" for the costs and expenses of prosecution he knows that the obligation he assumes is contingent and not absolute. He will not have to pay if:

(A) (1) he ultimately prevails on the merits; and

(2) he ultimately prevails on the class action issues; and

(3) the court orders that he be reimbursed for his costs and expenses from the amounts recovered for the class;

or (B) (1) his counsel advances the costs and expenses; and

(2) for one reason or another, his counsel does not enforce the plaintiff's responsibility to reimburse him for those amounts.

What is the effect of an adverse class action decision by a district court on a plaintiff who has accepted such an contingent

obligation? The decision does not preclude the possibility of the named plaintiff ultimately prevailing on both the class action issues and on the merits. He can proceed to try his individual claim on the merits and then appeal the class action decision. *United Airlines, Inc. v. McDonald*, — U.S. —, 53 L.Ed. 2d 423, 431 at n. 14 (1977). If he is successful on the merits and on the appeal of the class action decision, in the end he will not have to pay the costs and expenses of litigation. In this sense, then, an adverse decision by the trial court on the class action issues does no more than increase the probability that the named plaintiff may ultimately have to pay the costs and expenses of litigation. That possibility existed prior to a decision on the class action issues by the district court, and the possibility of escaping that payment continues to exist even after an adverse decision on the class action issues by the district court.

The size of the named plaintiff's claim becomes relevant only when it exceeds by an appreciable amount the anticipated costs and expenses of the litigation. In such cases the risk-reward analysis of the individual plaintiff might induce him to continue to prosecute his claim in the hope of recovering on his individual claim more than the costs and expenses of prosecution. However, in those cases in which the amount of the plaintiff's individual claim is less than the anticipated costs and expenses of prosecution, the size of the claim of the plaintiff is irrelevant to the probability of continued prosecution after a district court decision on the class action issues adverse to the plaintiff.

Moreover, if the costs and expenses are being advanced by the plaintiff's counsel, and if the plaintiff expects that his counsel will not try to collect those costs and expenses from him, then the plaintiff will continue to prosecute as long as his counsel is willing to finance the litigation. In such cases the size of the plaintiff's individual claim is irrelevant.

The process by which plaintiff's counsel decides whether or not to continue to advance the costs and expenses of a proposed class action after an adverse decision on the class action issues by the district court is similar to the process by which he decides whether or not to continue the prosecution of the action. This process was described above; on the decision to advance the costs and expenses the size of the claim of the individual named plaintiff is no more relevant than it was on the decision of counsel to continue to prosecute.

The third potential source of financing for a class action is other members of the proposed class. It may well be that in many proposed class actions it is not feasible or realistic to expect financial assistance from unnamed members of the class. In this case, however, as more fully developed above,[6] the record clearly indicates that such assistance was available.

In summary, the finality of a class action decision adverse to the plaintiff depends on (i) whether plaintiff's counsel is willing to continue to prosecute after the decision, and (ii) whether a source of financing is available for the costs and expenses. The resolution of the first of these issues depends primarily on subjective estimates made by plaintiff's counsel concerning the size of his anticipated fee and the probability of success; it is not dependent upon the size of the claim of the individual plaintiff. The resolution of the second issue may also be independent of the size of the plaintiff's claim; if the costs and expenses are being advanced by the plaintiff's counsel (who usually stands to gain substantially more than the individual plaintiff), his decision as to whether to put more money into the case will be based on essentially the same considerations as his decision on whether to put more time into the case. Consequently, a decision on finality cannot be based on the size of the plaintiff's claim or other facts that concern only the individual plaintiff. Any realistic analysis of finality must focus

[6] See note 2, *supra*.

on the plaintiff's counsel as well as on the plaintiff. *Hackett v. General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972).

In this case the Court of Appeals erred in not considering any factors except the size of the plaintiffs' claim, their financial resources, and the probable cost and complexity of the lawsuit. By so limiting its inquiry into finality it overlooked those factors that in fact determine finality. Consequently, even if the Court does not reject the death knell doctrine, it should reverse the decision of the Court of Appeals in this case.

II

The Court Should Reject the Death Knell Doctrine and Hold That the Court of Appeals Erred in Determining That the Order of the District Court Was a "Final Decision".

The Courts of Appeals in two circuits have expressly refused to adopt the death knell doctrine. *King v. Kansas City Southern Industries, Inc.*, 479 F. 2d 1259 (7th Cir. 1973); *Anschul v. Sitmar Cruises, Inc.*, 544 F. 2d 1364 (7th Cir.), cert. denied, 429 U.S. 907 (1976); *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972); *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3d Cir. *en banc*), cert. denied, 419 U.S. 885 (1974). In these circuits an order of a district court that an action cannot proceed as a class action can be appealed (like any other interlocutory order) only when the conditions of 28 U.S.C. § 1292(b) are met. This rule is sound, and this Court should reject the death knell doctrine for each of the reasons set forth in the brief of the other petitioner, Coopers & Lybrand. There is yet another compelling reason for rejection of the doctrine: the proper application of the doctrine would create a totally unwarranted tangle of procedural complexities.

It is patently not acceptable for a Court of Appeals to be the initial finder of fact on such a fundamental issue as finality, particularly if the court does not have a record directed toward such issue. Therefore, if death knell is to be accepted, there should be a procedure whereby the trial court can make the initial decision on finality upon a hearing and after an opportunity for discovery of evidence. But to create a procedure in the trial court for determination of the issue of finality would add yet another layer of procedural complexities to the already cumbersome class action device.

There is today in most class action cases a separate hearing on the class action issues, complete with extensive discovery, briefs, evidence, and opinions; it is frequently as complex and as time-consuming as a trial on the merits. To add a comparable hearing on the issue of finality would further increase the procedural involution of the class action. But not to have a hearing on finality would leave that issue to the intuition of the appellate courts, who would be guided only by a record developed on other issues. Moreover, many of the factors relevant to a realistic decision on finality are not easily proven or disproven by conventional evidence. If, as was suggested above, a relevant factor is the estimate of probability of success on the merits made by the plaintiff's counsel, what evidence could be offered concerning that factor? If the plaintiff's counsel testifies, what is the proper scope of cross-examination? Is the expectation of the plaintiff concerning the payment of the costs and expenses a proper subject for discovery? A hearing on the question of finality is a procedural thicket that should be avoided if at all possible.

It is not necessary to venture into that thicket. An appeal pursuant to 28 U.S.C. § 1292(b) is not dependent upon a finding of finality, and the availability of that statutory procedure for appellate review of at least some class action determinations has been widely recognized; *see, e.g., Katz v. Carte Blanche*

Corp., 496 F. 2d 747 (3d Cir., *en banc*), cert. denied, 419 U.S. 885 (1974); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F. 2d 594 (4th Cir. 1976); *Eastland v. Tennessee Valley Authority*, 553 F. 2d 364 (5th Cir. 1977), cert. pending; *Anschul v. Sitmar Cruises, Inc.*, 544 F. 2d 1364, 1368-1369 (7th Cir., cert. denied), 429 U.S. 907 (1976); *Sperry Rand Corp. v. Larson*, 544 F. 2d 868, 871 n.3 (8th Cir. 1977); *Blackie v. Barrack*, 524 F. 2d 891, 900 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); *Bowe v. First of Denver Mortgage Investors*, 562 F. 2d 640, 644 (10th Cir. 1977). Certainly there is nothing in the record in this case to indicate that the procedure provided by 28 U.S.C. § 1292(b) is inadequate.

The solution to the procedural problems created by the death knell doctrine is straight-forward: The doctrine should be rejected. Decisions on class action issues are not "final decisions" within the meaning of 28 U.S.C. § 1291, and they should be appealable only to the extent and by the method set out in 28 U.S.C. § 1292(b).

CONCLUSION

The Court should reject the death knell doctrine and hold that an order determining that an action cannot proceed as a class action is not a "final decision" within the meaning of 28 U.S.C. § 1291. The judgment of the Court of Appeals should be reversed.

If this Court does not reject the "death knell" doctrine, the judgment of the Court of Appeals nevertheless cannot stand. This Court should vacate the judgment of the Court of Appeals and remand the case to the District Court for a hearing and an initial decision on the issue of finality.

Respectfully submitted,

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ADDENDUM

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28 U.S.C. § 1291.—Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292.—Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in mhich appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 23, F.R.Civ.P.—Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an actior. maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims

or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.